Wal-Mart Stores, Inc. *and* United Food and Commercial Workers International Union, Local 1167 AFI–CIO, CLC. Case 21–CA–34515

August 21, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH AND ACOSTA

On July 17, 2002, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent herewith.

The judge found that the Respondent violated Section 8(a)(1) of the Act by soliciting and/or resolving employee grievances in order to dissuade employees from supporting the Union.[1] The Respondent excepts to this finding and asserts, among other things, that the solicitations were a lawful continuance of an established practice. We find merit in the Respondent's exceptions and find, contrary to the judge, that the Respondent did not violate the Act. Accordingly, we shall reverse the judge's decision and dismiss the complaint in its entirety.[2]

Facts

On January 5, 2001,[3] the Union filed a petition for an election in a bargaining unit consisting of automotive, tire and lubrication services (TLE) department employees at the Respondent's Lake Elsinore, California store.[4]

Kevin Curran is the district manager for the district that includes Lake Elsinore. Curran and Nick Fiello, division I district manager, provided general TLE oversight through periodic visits.

The Respondent has a longstanding company program called "Coaching By Walking Around" (CBWA). CBWA involves managers spending time with employees at the employees' jobs and being available to listen, advise, and instruct. When employees at a retail store show interest in a union, the Respondent's policy is to send area, regional, and home office management personnel (based in Bentonville, Arkansas) to the store to essentially engage in an election campaign, including CBWA. A number of managers from the Bentonville home office came to the Lake Elsinore store after the petition was filed, and among other things, engaged in CBWA in the TLE department.[5]

During the critical period, District Manager Curran, who, as noted, visited the store periodically as part of his regular duties, visited the store 5 days a week, with each visit lasting several hours. During these visits, Curran worked alongside the TLE employees. In January or February, Curran asked employee Robert Kinnee whether the Respondent could do anything for TLE employees.[6] Kinnee told Curran that certain tools were needed and complained that the auto bay door was sticking. Curran asked Kinnee to point out the needed tools from an equipment catalog. The tools were provided about a month later. The Respondent also repaired the door and other equipment. The Respondent presented evidence of past orders for tools and past repairs, including repairs on the bay door in the preceding year.

Analysis

An employer who has a past policy and practice of soliciting employees' grievances may continue such a practice during an organizational campaign**.** However, an employer cannot rely on past practice to justify solicitation of grievances where the employer "significantly alters its past manner and methods of solicitation." See *Carbonneau Industries*, 228 NLRB 597, 598 (1977). Thus, here the issue is whether during the campaign the Respondent solicited grievances in a manner that was significantly altered from its past manner and methods.

The judge observed that the Respondent here appeared to have been generally attentive to employees' needs in the past. She also acknowledged that Curran, on his visits to any store, asked TLE employees what he could do for them, if their equipment was working properly, and if they needed tools. The judge found, however, that Curran's visits to the Lake Elsinore store had been infrequent until the union campaign. She found no evidence that deficiencies in tools and equipment were addressed as quickly before the campaign as they were during the campaign. The judge found that the Respondent's "solicitation of grievances during the critical period was extraordinary in incident, pervasiveness, and the managerial level involved." Further, the judge stated that "it is

[1] The complaint was issued on April 26, 2002, not May 6 as the judge inadvertently stated.

[2] There are no exceptions to the judge's dismissal of all other complaint allegations.

[3] All subsequent dates are in 2001 unless otherwise indicated.

[4] The filing of the unfair labor practice charges against the Respondent blocked the election which had been scheduled for April 26.

[5] The judge has set out in her decision a full description of the various managers' activities during the campaign.

[6] Tracy O'Neal, Lake Elsinore store manager, was with Curran at the time of this conversation.

reasonable to infer that Respondent's solicitous omnipresence during the union campaign demonstrated Respondent's ability to address and resolve employee needs and inherently implied a promise to remedy grievances." Thus, she concluded that the Respondent violated Section 8(a)(1) by soliciting and remedying grievances in order to persuade the employees not to support the Union. For the reasons discussed below, we reverse the judge's finding that the Respondent's actions violated Section 8(a)(1).

Both the judge and our dissenting colleague seem to equate the change, during the critical period, in the number and level of managers *engaging in CBWA*, with a change in the number and level of managers *soliciting grievances.* Thus, our dissenting colleague argues that the Respondent "flooded the Lake Elsinore store with high-level managers who systematically solicited employee complaints, requests, and grievances." Thus, the dissent focuses on the number of headquarters-level managers and others present at the facility, the amount of time that they spent at the facility during the organizational campaign, and their participation in CBWA.

We recognize that the increased level of managerial personnel engaging in CBWA, as well as the increased frequency in which they were engaging in CBWA, gives rise to a suspicion that the methods and manner of solicitation of grievances changed during the organizational period. However, the record evidence does not support that suspicion. The Respondent's CBWA program existed before the union organizing campaign. After the advent of that campaign, the Respondent sent district and regional managers to engage in the election campaign. There is nothing unlawful about this, or the fact that these managers spent time involved in CBWA during the campaign. Nor is it unlawful for District Manager Curran, whose job included providing some of the general TLE oversight through periodic visits to the facility, to ask the employees the same type of questions during the campaign as before. Our dissenting colleague says that the Respondent admits that it "stepped up" the intensity of the CBWA in response to the organizing campaign. However, this was because the CBWA visits, after the union campaign began, included countercampaigning. To this extent, the CBWA activity was "stepped up." As noted above, it was not unlawful to engage in such countercampaigning. In short, there is no record evidence to support our dissenting colleague's assumption that more managers engaged in CBWA equals more solicitation of grievances.

The evidence—as opposed to the suspicions—supports a finding of only one incident of the Respondent resolving grievances during the critical period. That incident was substantially consistent with the Respondent's past practice. Thus, Curran asked employee Kinnee whether the Respondent could do anything for TLE employees.[7] This inquiry, as acknowledged by the judge, was consistent with past practice. Kinnee responded that they needed certain tools and that an auto bay door was sticking. Curran had Kinnee look through a catalog and choose the needed tools. The tools were provided about a month later. Respondent also repaired the bay door and other TLE equipment. The Respondent presented evidence of past tool orders and past repairs including two repairs on bay doors in the preceding year. The judge found, however, that there was "no evidence that past deficiencies were so quickly remedied." But, given that the Respondent had asked employees in the past about tool and repair needs and had corrected the deficiencies, it was incumbent on the General Counsel to show, in fact, that the deficiencies here were corrected quicker than usual.[8] Thus, the evidence establishes that the occurrence of soliciting and remedying grievances during the critical period was substantially consistent with past practice. We, therefore, conclude that the Respondent did not violate Section 8(a)(1). We shall therefore order that the complaint be dismissed.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

In direct response to the Union's organizational campaign, the Respondent flooded the Lake Elsinore store with high-level managers who systematically solicited employee complaints, requests, and grievances. This was a significant departure from the Respondent's more limited past practice of soliciting and remedying employee grievances. I dissent from my colleagues' refusal to find this conduct unlawful.

[7] The judge also noted that TLE employee Timothy Schaffner testified that he had overheard Curran ask "other TLE employees if they needed tools and/or what things needed to be fixed in the department." However, Schaffner's testimony was vague as to when he had overheard Curran's question, the content of the conversation between Curran and the other employees, and the number of times Schaffner overheard such a conversation. Employee Thomas Meden testified that Curran asked him the same type of questions during the campaign as before the campaign. These questions were, how was Meden doing, how was his day, and was there anything Curran could do for him.

[8] The General Counsel points out that Kinnee testified that he had not seen the catalog from which he was allowed to choose tools previously, and that he had never been asked to "order tools." We decline the invitation to find that Curran's giving Kinnee a catalog to choose the tools that he had stated were needed constituted a significant departure from the past practice of inquiring if employees needed tools. More is needed to support such a holding.

Background

There is no dispute about the facts. In the absence of employee interest in a union, the Respondent's local and district managers occasionally engage in the practice of "Coaching By Walking Around" (CBWA), which involves soliciting information from employees about their concerns and needs in the work environment and being available to "instruct, listen and advise." These managers are trained to initiate conversations with employees and ask them how they are doing and if they need anything to help them with their jobs. Only infrequently would a high-level manager at headquarters engage in CBWA at a store.

When employees demonstrate an interest in a union, however, the CBWA engaged in by the managers, particularly the high-level managers, increases dramatically. The increase in the participation of all levels of managers in CBWA at the Lake Elsinore store in response to the Union's presence there is firmly established by the record. For example, in regard to the local and district managers, Lake Elsinore Store Manager Tracy O'Neal "frequently and unprecedentedly" worked alongside TLE employees during the critical period, TLE District Manager Curran, who normally visited Lake Elsinore a few times a month, increased his periodic visits to 5 days a week, 3 to 6 hours a day, comprising 80 percent of his worktime, and Division 1 District Manager Nick Fiello, who normally visited every few months, also significantly increased his store visits. With respect to headquarters-level managers, TLE Regional Personnel Manager Curtis Smith was at the store almost daily, in spite of the fact that he had geographic responsibility for about 500 stores, and TLE Regional Manager Emily Cook was at Lake Elsinore 10 to 11 days during the critical period, admittedly more than at any other store.[1] When the election was put on hold, the intensity of managerial visits decreased markedly, returning to the level at which they had been prior to the advent of the Union's campaign.

Analysis and Conclusions

The Board has long held that the solicitation of grievances during an organizational campaign violates the Act. The Board has stated:

> [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. . . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. [*Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001), quoting from *Maple Grove Health Care Center*, 330 NLRB 775 (2000).]

The Board has also held that "where an employer already has a policy of soliciting employee grievances, 'the employer may continue the practice during the organizing drive, but may not significantly alter its past manner and method of solicitation.'" *DMI Distribution of Delaware*, 334 NLRB 409, 471 (2001). The Board has further held, however, that "an employer cannot rely on past practice to justify solicitation of employee grievances where the employer significantly alters its past manner and methods of solicitation." *Carbonneau Industries*, 228 NLRB 597, 598 (1977).

My colleagues and I are in agreement with these principles. We also agree that the Respondent has a past practice of soliciting grievances from its employees, embodied in CBWA. Contrary to my colleagues, however, I would find that the Respondent has significantly altered its past practice in response to the organizing campaign.

By its own admission, the Respondent significantly "stepped-up" its CBWA in direct response to the Union's organizing campaign.[2] This involved a dramatic increase in management participation in CBWA, particularly among headquarters-level managers. This altered version of CBWA is not, contrary to my colleagues, substantially the same as the prepetition practice of CBWA. Indeed, the employees noticed the departure from the usual practice. Regional Personnel Manager Smith had been at the Lake Elsinore store almost daily during the critical period, even though he had geographic responsibility for some 500 stores. Employee Kinnee mentioned to Smith that Smith was probably getting tired of being away from his family. Smith responded that if the employees would tell the Union that they did not want the Union to represent them, the headquarters managers "would all be out of [the employees'] hair."

The increase in the number of solicitations of employee grievances, and in the level of the managers involved in the solicitations, stands in stark contrast to the Respondent's limited solicitations in the absence of the Union's presence. The Respondent cannot rely on its past practice of soliciting grievances through CBWA because it significantly altered that practice in the context of a union campaign.

My colleagues concede that the increased level of managerial personnel engaging in CBWA, as well as the increased frequency in which they were engaging in

[1] In fact, Cook, who began her job with the Respondent on or about January 26, made Lake Elsinore her very first store visit as regional manager.

[2] The Respondent admitted "flooding" the Lake Elsinore store to engage in the more intense version of CBWA precisely because of the Union.

CBWA, gives rise to a "suspicion" that the methods and manner of solicitation of grievances changed during the organizational period, but they nonetheless conclude that the record evidence does not support that suspicion. In reaching this conclusion, my colleagues err in suggesting that an increase in solicitations cannot be found in the absence of evidence of the specific exchanges between managers and employees during the increased CBWA in the critical period. Such affirmative evidence is not necessary in light of the Respondent's admissions. The Respondent admits that CBWA involves asking employees how they are doing and if there is anything they need. The Respondent also admits that such questioning, which is a necessary component of CBWA, is a solicitation of grievances. The Respondent further admits that it "stepped up" the intensity of the CBWA in direct response to the organizing campaign. If *more* managers engaged in *more* CBWA, it follows that *more* solicitations occurred, regardless of the specific content of those solicitations.

Accordingly, by departing from its more limited past practice of soliciting and remedying employee grievances, the Respondent violated Section 8(a)(1) of the Act.

Sonia Sanchez and *Robert MacKay, Esqs.*, for the General Counsel.
Steven D. Wheeless and *Cyrus Martinez, Esqs.* of Phoenix, Arizona, for the Respondent.
Jeffrey Wohlner, Esq., of Encino, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. This case was tried in Temecula, California, on May 28 and in Lake Elsinore, California, on May 29, 2002.[1] Pursuant to charges filed by United Food and Commercial Workers, International Union, Local 1167, AFL–CIO, CLC (the Union), the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint) on May 6, 2002. The complaint alleges that Wal-Mart Stores, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Issues

1. Did Respondent violate Section 8(a)(3) and (1) of the Act during the period January through April by imposing more onerous working conditions on its Tire Lube Express department (TLE) employees by increasing their supervision?

2. Did Respondent violate Section 8(a)(1) of the Act during the period January through April by threatening employees with job loss if the Union were selected and a strike called?

3. Did Respondent violate Section 8(a)(1) of the Act during the period January through April by soliciting and resolving employee grievances in order to dissuade employees from supporting the Union?

4. Did Respondent violate Section 8(a)(1) of the Act during the period January through April by threatening employees that it was futile to select the Union as their collective-bargaining representative?

5. Did Respondent violate Section 8(a)(1) of the Act during the period January through April by attributing more onerous working conditions of increased supervision to employees' support of the Union?

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with an office and place of business in Lake Elsinore, California (the Lake Elsinore store), is engaged in the operation of a chain of retail department stores throughout the United States. During a representative 12-month period ending March 31, 2002, Respondent derived gross revenues in excess of $500,000 from its business operations and purchased and received at the Lake Elsinore store goods and materials valued in excess of $50,000 directly from points located outside the State of California. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES RELEVANT CREDIBLE EVIDENCE

Among the various departments operated in the Lake Elsinore store, Respondent sells automotive products from its automotive department and tire and lubrication services from its auto service department, the combined departments being known as TLE. At all relevant times, onsite TLE supervision consisted of Willie Carter (Carter), TLE manager, and Tracy O'Neal (O'Neal), Lake Elsinore store manager. Although not employed onsite, Kevin Curran (Curran), district manager, and Nick Fiello (Fiello), division I district manager provided general TLE oversight through periodic visits.

On January 5, the Union filed a petition for election under Section 9(c) of the Act in a unit of the following employees:

> All full-time and regular part-time employees employed in [TLE], including the department manager, support manager, service manager, department greeter, automotive service technicians, courtesy technicians, lower back bay technicians, upper bay technicians, tire technicians, sales associates and stocker at the [Lake Elsinore store].

[1] All dates are in 2001 unless otherwise indicated.

[2] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

The Regional Director for Region 21 issued a Decision and Direction of Election on March 26. Directed for April 26, the election was subsequently blocked by the instant unfair labor practice charges. The period from the filing of the petition (January 5) to the directed date of election (April 26) is referred to herein as "the critical period."

Respondent has a longstanding company policy referred to as "Coaching for Success" or "Coaching By Walking Around" (CBWA). Company policy PD-30 states that "[CBWA] can be defined as an informal, ongoing process of helping [employees] achieve results." The process involves management "spending time with [employees] where the work is done, being available to instruct, listen and advise." When employees at a particular retail site show interest in a union, Respondent's policy is to send area, regional, and home office management personnel (based in Bentonville, Arkansas) to the site where they engage in CBWA. In addition to performing the functions encompassed in CBWA, the management employees provide education concerning the union to onsite management personnel and employees, share Respondent's union policy with employees, and are available to demonstrate an interest in employee concerns.

In its employee manual, Respondent maintains it is not antiunion but proemployee and strongly opposed to third-party representation. Respondent states its belief that employees should be able to resolve their problems through utilization of Respondent's open-door policy.

At the commencement of the critical period, the following managers from the Bentonville, Arkansas home office came to the Lake Elsinore store: Emily Cook (Cook), regional TLE manager, Curtis Smith (Smith), regional manager, Gisel Ruiz (Ruiz) and Aaron Gillingham (Gillingham), human resources. They engaged in CBWA in the TLE department. Smith was at the Lake Elsinore store almost daily during the critical period where he worked alongside employees and talked with them about their families and personal and work-related concerns. Cook was at the store less frequently but visited during several weeks of the critical period. During the second week in April, she made a benefit presentation to employees, outlining and explaining Respondent's existing benefits. During the critical period, O'Neal frequently and unprecedentedly worked alongside TLE employees. Although Curran had visited the Lake Elsinore store in the course of his normal duties before the critical period, his visits increased to 5 days a week, 3 to 6 hours each day. While there, he worked alongside TLE employees, discussed Respondent's open-door policy with them, and told them he did not think they needed third party representation. Fiello significantly increased his Lake Elsinore store visits during the critical period and worked alongside TLE employees.

At a storewide meeting in January, O'Neal told employees that managers from headquarters were there because of the union representation drive. In April, in response to a comment that Smith was probably getting tired of being away from his family, Smith told employee Robert Kinnee (Kinnee) that if employees would tell the Union they didn't want to be represented by the Union, "we would all be out of your hair."

Kinnee was Respondent's TLE service manager in the Lake Elsinore store. In January/February, Curran and O'Neal asked him whether Respondent could do anything for TLE employees. Employee Timothy Schaffner (Schaffner) also testified he overheard Curran ask other TLE employees if they needed tools and/or what things needed to be fixed in the department. In response to Curran, Kinnee said they needed certain tools and complained that an auto bay door was sticking. Curran asked Kinnee to go through an equipment catalog and point out the needed tools, which Respondent provided to employees about a month later. Respondent repaired the sticking bay door as well as other TLE equipment. Respondent presented evidence of past tool orders and past repairs, including two repairs on bay doors in the preceding year. In the past, Respondent's managers have asked service managers about TLE tool and repair needs.

Ruiz, labor relations manager during the critical period, presented union and strike information programs to small groups of TLE employees in mandatory meetings, using computer-generated visuals and handouts. She followed written notes closely in making her oral presentation. Respectively, the visuals concerning strikes and the notes read:

Permanent Replacement?

- When A Union Strikes To Support Its Contract Demands, It's Called An Economic Strike
- Company Could Hire Permanent Replacements
- When The Strike Ends, Permanent Replacements Have The Right To Keep Their jobs—Even If The Strikers Want Their Jobs Back!

NOTES:

- While the union has the right to call an economic strike, Wal-Mart has the right to keep operating, and that includes the right to hire replacement workers to do the strikers' jobs.
- Wal-Mart may or may not hire permanent replacements during a strike, But the company would certainly have to consider its options in keeping the store running and serving our customers. For example, Wal-Mart could use TLE associates from other stores.
- The longer the strike lasted, the more likely it is that Wal-Mart would have to hire permanent replacements.
- When the strike ends, the permanent replacements would be entitled to keep their job [sic], even if the strikers wanted their jobs back.

Employee John Humphrey (Humphrey) testified that at one of the meetings conducted by Ruiz in early April, she told employees that should the Union win the election and the parties reach impasse in negotiations, the Union could call for an economic strike. Employees would have to comply and strike. Respondent had the legal right to replace striking employees and would not be required to give them their jobs back.

Kinnee recalled that during one of the meetings, Ruiz "made it sound like we were going to go out on strike if we didn't get

a contract . . . that if we were out on strike long enough other people would take our positions . . . and when we come back there may not be a job for us." Although I find the employee witnesses to be generally credible, I am mindful that listeners often have difficulty distinguishing between what was actually said or clearly implied as opposed to what they unwarrantedly inferred. Here, since Ruiz used visuals, handouts, and written notes in making her remarks, and testified in a sincere, forthright manner, I credit her version of what she said regarding potential strike consequences. Moreover, I note that Kinnee's account is essentially corroborative of Ruiz.

Kinnee also testified that in April, he overheard Carter telling employee Alan Johnson that the TLE employees were going to find out that they wasted their time trying to get a union. I credit Kinnee's account.

B. Discussion

The General Counsel accurately points out that Respondent's stated philosophy toward union organizing is evidence of animus. *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999). As the General Counsel concedes, the employee handbook statements alone do not rise to the level of an unfair labor practice. See *Sunrise Health Care Corp*, 334 NLRB 903 (2001). Dislike of unions is not uncommon among employers and principles of free speech as well as Section 8(c) of the Act permit it to be expressed. Animosity alone without adverse employment action does not violate the Act. It is the General Counsel's burden to show that employment actions are adverse to employees, meaning: "more burdensome, undesirable, or unpleasant" than formerly. *King David Center*, 328 NLRB 1141, 1143 (1999).

The General Counsel asserts that when Respondent's area and home office management personnel flooded the Lake Elsinore store during the critical period, it constituted imposition of more onerous working conditions on employees by increasing supervision and violated Section 8(a)(3) and (1) of the Act. It is certainly true that Respondent management came in force to the Lake Elsinore store during the critical period and that they did so in response to TLE employees' union activities. However, contrary to the General Counsel's argument, there is no evidence that any visiting manager actually supervised or evaluated any employee or imposed any changed working condition. While the visiting managers worked alongside the TLE employees and expressed interest and concern in their working and personal lives, employment conditions, and supervisory lines remained the same. Respondent may justifiably be accused of increased affability, but the General Counsel has not cited, and my research has not revealed, any case holding geniality to be a violation of the Act, however unprecedented and widespread it may be.[3] The supernumerary presence of management representatives may have been tiresome or even annoying to TLE employees, but I cannot find it reasonably to have been threatening or coercive. I conclude that Respondent did not violate Section 8(a)(3) and (1) of the Act by imposing more onerous working conditions on the TLE employees through increased supervision. It follows that O'Neal's attributing the unusual management presence to employees' union organizing efforts is likewise permissible under the Act, as is Smith's statement that managers would be "out of [employees'] hair" if employees rejected the Union.

During the critical period, Respondent managers asked TLE employees what they could do for the employees or what they needed and thereafter supplied requested tools and made cited repairs. The General Counsel argues that this constitutes solicitation and remedy of grievances in violation of Section 8(a)(1) of the Act. As Respondent points out, supplying tool and repair needs is a legitimate business concern. However, doing so for the purpose of discouraging interest in a union, or in a manner calculated to discourage interest in a union, violates the Act. *Insight Communications Co.*, 330 NLRB 431, 457 (2000); *Palm Garden of North Miami*, 327 NLRB 1175 (1999). The General Counsel need not provide specific evidence of motivation or show that solicited grievances were, in fact, remedied. "[The] solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances." *Clark Distribution Systems*, 336 NLRB 747, 748 (2001);[4] *Hospital Shared Services*, 330 NLRB 317 (1990). Grievance solicitation during an organizational campaign creates a "compelling inference," that the employer seeks to influence employees to vote against union representation. *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999).[5]

Respondent argues that its conduct during the union campaign did not differ from past practice, adherence to which vitiates any finding of unlawful grievance solicitation. See *Clark Distribution* and *MacDonald Machinery Co.*, supra. As Respondent points out, Curran, during visits to any store, asked TLE employees what he could do for them, if their equipment was working properly, and if they had the tools they needed to do their jobs. However, his visits to the Lake Elsinore store were admittedly infrequent as compared to his presence during the union campaign, and there is no evidence that past deficiencies were so quickly remedied as they were during the campaign. While Respondent appears to have been generally attentive to employee needs in the past, the solicitation of grievances during the critical period was extraordinary in incidence, pervasiveness, and the managerial level involved. See *6 West Limited Corp.*, 330 NLRB 527, 528–529 (2000); *Flight Safety, Inc.*, 197 NLRB 223 (1972). It is reasonable to infer that Respondent's solicitous omnipresence during the union campaign demonstrated Respondent's ability to address and resolve employee needs and inherently implied a promise to remedy grievances. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act, as alleged, by soliciting and remedying grievances in order to dissuade employees from supporting the Union.

The General Counsel contends that Respondent violated section 8(a)(1) when Ruiz told a meeting of employees in April of potential economic strike consequences. Ruiz' statements were legally accurate as far as they went. She neglected, however, to

[3] In an analogous case cited by Respondent, the Board affirmed an administrative law judge finding that similar employer tactics did not constitute surveillance. *Beverly California Corp.*, 326 NLRB 232, 259–260 (1998), enfd. in pertinent part 277 F.3d 817 (7th Cir. 2000).

[4] Quoting *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

[5] Reiterated in *MacDonald Machinery Co.*, 335 NLRB 319 (2001).

inform employees that economic strikers who unconditionally apply for reinstatement after permanent replacements fill their positions retain their status as employees and are entitled to future reinstatement, absent substantial legitimate business justification. See *Laidlaw Corp.,* 171 NLRB 1366 (1968).[6] In the absence of threat of reprisal or force or promise of benefit, an employer may, under Section 8(c) of the Act, make predictions about the consequences of union representation. Unless the statements may reasonably be taken as a threat of reprisal, an employer does not violate the Act "by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike . . . [and] an employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in Laidlaw." *Eagle Comtronics*, 263 NLRB 515, 515–516 (1983). Under *Eagle Comtronics*, an employer may "lawfully inform employees that they 'could' be permanently replaced, without telling them that they would retain employment rights." *Unifirst Corp.,* 335 NLRB 706, 707 (2001) (citations omitted). Moreover, ambiguities in such statements are resolved in the employer's favor if the statements are made, as here, in an atmosphere free from threat of retaliation. *Unifirst Corp.,* Id. Accordingly, I conclude that Ruiz' statements concerning strike consequences did not violate the Act.

The General Counsel urges that Carter's statement that TLE employees were going to find out they had wasted their time trying to bring in a union unlawfully expresses futility of employee union activity. Unlawful expressions of futility generally explicitly or implicitly predict an employer intention to obstruct bargaining. I cannot conclude that Carter's statement implied that Respondent would fail to bargain in good faith or that Respondent would engage in any unlawful tactics. The Board has found "employers' warnings of 'serious harm' that may befall employees who choose union representation are not unlawful in and of themselves." *Reno Hilton Resorts Corp.,* 319 NLRB 1154, 1155 (1995*).* Carter's statement is not only milder than a warning of "serious harm" but is susceptible of several interpretations, including lawful ones. It is just as reasonable, for example, to infer that Carter meant employees would not be satisfied with union representation should they achieve it as it is to infer that he meant Respondent would act to ensure the futility of their union choice. The Board has found an employer agent's statement that "'you guys would have been better off without the Union' . . . merely conveyed the economic reality that if the employees had decided . . . [against the union] they would not . . . be subject to [union] dues." *Penn Tank Lines, Inc.,* 336 NLRB 1066 fn. 2 (2001). While Respondent engaged in unlawful conduct in soliciting and remedying grievances, it did not engage in the kind of activity that would render Carter's otherwise lawful prediction coercive. An employer has a right "to make comparisons or descriptions that are unfavorable to a . . . union . . . [and may] express its opinion that employees would be better off without the Union." *Langdale Forest Products Co.,* 335 NLRB 602, 603 (2001). Accordingly, I conclude that Carter's statement that employees would find they wasted their time trying to bring in a union did not violate Section 8(a)(1) of the Act.

[6] Enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

CONCLUSIONS OF LAW

1. By soliciting and/or resolving employee grievances during the period January through April, 200, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. Respondent has not violated the Act as otherwise alleged in the complaint.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]